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No. 80-1082

IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Petitioner,

—against—

WILLIAM R. PHILLIPS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF ON THE MERITS FOR RESPONDENT

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Preliminary Statement

This supplemental brief is filed pursuant to Rule 22.6, Rules of this Court, providing for the filing thereof to call attention "to new cases or legislation or other intervening matter not available at the time of the party's last filing." Respondent's Brief and Appendix were filed on August 3, 1981. On August 24, 1981, in the advance sheets to volume 652, Federal Reporter, at Page 654, respondent's counsel discovered the case of *McCoy* v. *Goldston*, which was decided on June 26, 1981, by the Sixth Circuit. In their opinion, the decision in that case is relevant and material to some of the questions presented in the instant one.

ARGUMENT

McCoy v. *Goldston*, 652 F.2d 654 (6th Cir. 1981) involved a suit, brought, pursuant to 42 U.S.C. 1983, by two plaintiffs against several Detroit police officers and that city's Police Department for the alleged violation of the former's civil rights. During the *voir dire* of prospective jurors, the trial judge asked the venire whether any of its members had "any experience with any law enforcement agency, or any way with the law, whether it is a police department or any other agency. . . . [or] any close friends or relatives who are connected or associated with any law enforcement agency or police department." 652 F. 2nd at 656. Of the three prospective jurors who answered these inquiries in the affirmative, one, who had several friends who were retired police officers, was subsequently excused because of a hearing problem; another, who stated that he had served as an Army military policeman and worked as a records supervisor and substitute corrections officer in 1953, was peremptorily challenged by plaintiff's counsel; while a third, who revealed that her husband was an auxiliary police officer who engaged in traffic control and similar duties, was accepted as a trial juror, *Id.*

However, the foreperson, a Mrs. Cleo Green, failed to disclose that her son was about to complete a training course as a parole officer. *Id.* This information did not come to light until plaintiff's counsel, following an adverse jury verdict, interviewed, with the trial judge's permission, two jurors. It was during these interviews that said counsel first learned, from another juror, about Mrs. Green's son. *Id.* When he attempted to interview Mrs. Green, she refused to talk to him. *Id.* Upon being informed of these developments, in connection with plaintiffs' motions for a new trial pursuant to Rule 59, Fed. R. Civ. P., and for relief from judgment, Rule 60 (b), Fed. R. Civ. P., the trial court denied both motions. 652 F. 2nd at 656-7.

The Sixth Circuit reversed and remanded the case "for appropriate proceedings." 652 F. 2nd at 660. In so doing, it stated that:

> a new trial must be granted where the undisclosed information would have resulted in the juror's disqualification for cause. This occurs when either the juror admits a feeling of partiality or "the judge makes a pragmatic judgment that there is a substantial possibility of the juror unconsciously favoring one side or another." . . . [We] also hold that a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposely incorrect answer.

625 F. 2nd at 659.

Here, where the concealment of the juror's application for a position with the prosecutor's office, surely a more prejudicial relationship than that affecting Mrs. Green's son, was made by the prosecutor in an extremely serious criminal rather than a civil case, it would seem that respondent is clearly entitled to a new trial. The con-

clusive presumption of bias "as a matter of law," as enunciated by this Court in *United States* v. *Wood*, 299 U.S. 123, 133 (1936), is patently applicable to the facts of this case. Had the prosecutor not wilfully concealed the Smith job application, respondent might well have persuaded the trial judge that "there [was] a substantial possibility of the juror unconsciously favoring one side or another." 652 F. 2nd at 659. Although the jury was already seated and sworn and, therefore, immune from peremptory challenges, the availability of four alternates would undoubtedly have resulted in the discharge of Juror Smith, as subsequently occurred in regard to Juror Bethel. The prosecutor's willful silence made this efficacious resolution impossible, thus leaving a new trial as the only satisfactory remedial action.

Respectfully submitted,

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